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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re patent application of

Emmanuel Yashchin

Serial No. 10/040,474

Filed January 9, 2002

For SMART MESSENGER

Box AF

Commissioner for Patents

PO Box 1450

Alexandria, Virginia 22313-1450

Confirmation No. 2599

Group Art Unit 2155

Examiner Alicia Baturay

**BOX "AF"**  
**RESPONSE UNDER 37 C.F.R. § 1.116**  
**---EXPEDITE PROCEDURE---**  
**EXAMINING GROUP 2155**

*DO NOT ENTER*  
*Alicia Baturay*  
*3/23/06*  
*Entered ref RCE*  
*dd 4-6-06*  
*EWms-4-13-06*

**CONDITIONAL PETITION TO REMOVE PREMATURE INDICATION OF  
FINALITY OF REJECTION AND AMENDMENT UNDER 37 C.F.R. 1.111**

Sir:

An Appeal Brief was filed in the USPTO in the above-identified application on October 31, 2005. In response, the Examiner re-opened prosecution and entered an office action with completely new grounds of rejection, and has identified the office action as a Final Rejection. The Examiner took the position in the office action that the Final Rejection was necessitated by an amendment filed by the applicant. However, no amendments were filed by the applicant, and the claims at issue in the appeal brief were entered by filing of the notice of appeal and the appeal brief (not entry 7(b) on the advisory action mailed August 12, 2005). As such there is no legally cognizable reason for making the office action a final rejection, and the office action prematurely cuts off the applicant's ability to amend the claims and respond to the new grounds of rejection as a matter of right. Therefore, the office action should be revised to eliminate the notation that the action is a final rejection, or the finality should be otherwise withdrawn.

The indication in the office action that the application is under final rejection is premature and is an error on the part of the USPTO, and therefore, no fees should be required for withdrawing the finality of the rejection. If fees are due, the applicant has hereby made a conditional petition to remove the premature indication of finality, and the Commissioner is authorized to charge attorney's